

525/96

FROM: D A LAVERY
CENT SEC
24 SEPTEMBER 1996

DESK IMMEDIATE

cc PS/PUS (B&L)
PS/Sir David Fell (o/r)
Mr Thomas (o/r)
Mr Leach (B&L)
Mr Watkins
Mr Bell
Mr Hill (B&L)
Mr Stephens (B&L)
Mr Maccabe
Mr Whysall
✓ Mr Jagelman

PS/Michael Ancram (B&L)
PS/Secretary of State (B&L)

CONFIDENTIALITY DEBATE

1. This is to provide some briefing material for use at the resumed Plenary session on the principle of confidentiality.
2. The paper on confidentiality by the Independent Chairmen is attached. It is, for the most part, unobjectionable. However paragraph 4 may require further consideration as it could prevent participants making use of their own papers which they had produced in the course of the negotiations. It would seem preferable that the participants should retain "ownership" of original material stating their own (but not other participants') position.

[Signed: DAL]

D A LAVERY

THE PRINCIPLE OF CONFIDENTIALITY

HMG BRIEFING NOTES FOR RESUMED PLENARY DISCUSSION ON 24 SEPTEMBER 1996

The Rule on Confidentiality

1. Rule 16 of the Rules of Procedure adopted on 29 July imposes a general duty of confidentiality in the negotiations, as follows:

"[All participants in the negotiations] ... will maintain confidentiality on all aspects of the negotiations except where they may from time to time agree to publicity."

Purpose of the Rule

2. The main purpose of the Rule of Confidentiality should be to avoid inhibiting the development of the negotiations. It should operate strictly to achieve this objective. It should not, however, be applied in such a way as to stultify public debate outside the Talks process. It should not, for example, prevent the participants explaining to the public the position they have adopted in relation to matters of general public interest.

Scope of the Rule

3. The Rule of Confidentiality should apply equally to written material and also to oral material created in the course of the all-party negotiations.
4. This would mean, for example, that the official minutes of the negotiations, and the information contained in those minutes, should remain strictly confidential. Similarly, memoranda

prepared by the Office of the Independent Chairmen should remain strictly confidential.

5. The participants would, however, expect to have an opportunity to comment on and correct official records of the talks, eg official minutes. We should therefore seek to ensure that the Chairmen offer only draft minutes initially.
6. The Rule of Confidentiality should apply equally to all participants in the negotiations. It would apply to the two Governments. However, HMG is in a special and unique position and must remain publicly accountable to Parliament for its conduct of the Talks. We may assume that similar considerations apply to the Irish Government.
7. The length of the period of confidentiality should, as a minimum, be for the duration of the process of the talks. It would then be for further consideration at the end of the talks process.

Exceptions to the Rule of Confidentiality

8. Rule 16 contemplates an explicit exception where the participants agree to publicity.
9. Disclosure of confidential material might also arise on foot of a court order.
10. In addition to this, there would seem to be a range of possible exceptions to the general Rule of Confidentiality. These exceptions are necessary to avoid artificially stultifying public debate in relation to the talks process. Without these exceptions, the Rule of Confidentiality would act as a "gagging order". This would not be in the public interest.

11. Possible exceptions to the Rule of Confidentiality include the following:

- (a) statements by the participants of their publicly held positions - it would be unreasonable to prevent the participants from stating in public the policy positions they have adopted in relation to matters which will be the subject of negotiation at the talks. For example, a participant may have developed a policy position in relation to new administrative institutions in Northern Ireland, and it would be unrealistic to expect to prevent that participant from explaining their policy position in public.
- (b) statements by the participants generated in the course of the talks - it would seem reasonable that the participants should be allowed to deploy in public papers and positions they have adopted in relation to matters arising in the talks process. For example, it would seem to be in the public interest that the participants should be free to publish their Opening Statements in the talks. Similarly, a participant may wish to be able to release material initially prepared as a position paper in the talks - eg a participant may wish to publish a paper on policing reform. The parties must however avoid by this means directly or indirectly disclosing the positions of other participants which are not already in the public domain.

Sanctions for Breach of Rule

12. It would seem to be best to leave it to the Independent Chairmen to determine what sanction, if any, would be appropriate where a participant is clearly in breach of the Rule of Confidentiality. We could also encourage a

constructive role for the Business Committee in this. It would not be desirable to set up an elaborate procedure such as that which applies under Rule 29 for parties who are alleged to have dishonoured the Mitchell principles. It does not seem desirable in principle to operate a "first strike" rule (which would allow other parties to respond where a participant is seen to have breached confidentiality) - this would be a recipe for a "free for all".

Passing Information to Third Parties

13. The Rule of Confidentiality, and its exceptions, should cover any situation where a party wishes to pass material to a non-participant. Therefore, no special rule (and no special undertaking on the part of the Governments) should be necessary to deal with this.
14. HMG would agree to be bound by the Rule of Confidentiality in all its aspects (subject to the fundamental principle that the Government remains accountable to Parliament).

Rules of Procedure

15. The participants have yet to decide whether the Rules of Procedure adopted on 29 July are to be made publicly available. Indeed, there may be a mistaken assumption that this is already a public document.
16. It would be helpful if the participants could, therefore, agree that the Rules of Procedure should be made publicly available. The Rules would, therefore, with the agreement of the participants be treated as an exception under Rule 16.

FROM: D A LAVERY

Official 'briefings' by the Chairman

17. There may be an advantage in agreeing that the Independent Chairmen should be able to publish a neutral daily statement on the negotiations which might be made available to the press.

[24/9/96]

Mr. Leach (BAL)
Mr. Watkins
Mr. Sell
Mr. Hill (BAL)
Mr. Stephens (BAL)
Mr. MacCabe
Mr. Whyte
Mr. Jagelman

PS/Michael Anderson (BAL)
PS/Secretary of State (BAL)

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